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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>HUY TRONG TRAN,<br>Defendant and Appellant. | G042579<br>(Super. Ct. No. 07WF2294)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed as modified.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Huy Trong Tran of two counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664; all further statutory references are to this code), shooting at an occupied motor vehicle (§ 246), two counts of assault with a semiautomatic firearm (§ 245, subd. (b)), misdemeanor domestic violence (§ 243, subd. (e)(1)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). It also found true he personally discharged a firearm in the attempted murder counts (§ 12022.53, subd. (c)) and personally used a firearm in those plus the assault with a firearm counts. (§ 12022.5, subd. (a)).

Defendant argues the evidence is insufficient to show the attempted murders were premeditated, the court erred in failing to give CALCRIM No. 302, and the abstract of judgment incorrectly reflects his sentence and custody credits. Agreeing with the last contention, we shall direct the trial court to prepare an amended abstract of judgment. In all other respects, the judgment is affirmed.

## FACTS

After breaking up with defendant, Michelle Ho began dating Antonio Hernandez. Defendant was unhappy about that and asked Ho if they could get back together but she refused. He exchanged hostile text messages with Hernandez. In four of the approximately 20 texts he sent to Hernandez, defendant stated, "When I see you, it's on," "Fuck you," "You can have my leftovers," and "I'll meet up with you anywhere."

Several times, defendant went to Ho's house when Hernandez was there and the two yelled at each other. On one occasion, defendant cursed and pointed a gun at Hernandez but Ho was able to convince defendant to leave.

A couple of months later, defendant sent Ho angry text messages and went to her house. They argued and he struck her on the back of the head with his closed fist, causing her to fall. She fought back and he hit her again before leaving. Ho called

Hernandez, who said he and his friend Daniel Sanchez would be right over. Ho then told defendant to leave because Hernandez was on his way. Defendant replied, "I'm going to wait for him and I'm going to kill him," lifting his shirt up and showing her a gun in his waistband.

As Hernandez and Sanchez arrived, defendant was walking toward his truck. Hernandez parked his car and approached defendant, who ran into his truck. When Hernandez slammed his hand against the driver's side door and said, "Get out," defendant pulled out his gun and cocked it. Upon seeing the gun, Hernandez ran back to his car and sped away.

Defendant followed Hernandez closely in his truck and pointed the gun out of his driver's side window as the vehicles slowed. Hernandez then sped up again. The pursuit through a residential neighborhood lasted 5-10 minutes and reached speeds of 50-60 miles per hour as Hernandez tried to evade defendant. At one point, Hernandez was slowing down when he heard a loud bang and his back window shattered. A bullet struck the plastic seat belt holder on Hernandez's driver's side door, causing a piece of plastic to break off and hit him in the ear.

When he no longer saw defendant behind him, Hernandez returned to Ho's house. As he and Sanchez ran towards the house, defendant pulled up and fired another shot at Hernandez before driving away. The bullet struck Ho's house.

## DISCUSSION

### *1. Substantial Evidence to Support Attempted Premeditated Murder*

Defendant contends substantial evidence does not support the jury's finding the attempted murders were willful, deliberate, and premeditated. We disagree.

"Like first degree murder, attempted first degree murder requires a finding of premeditation and deliberation." (*People v. Villegas* (2001) 92 Cal.App.4th 1217,

1223, fn. omitted.) "'"Deliberation" refers to [a] careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' [Citations.]"' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1182.)

A reviewing court typically considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported: "prior planning activity," "motive," and "the manner of killing." (*People v. Villegas*, *supra*, 92 Cal.App.4th at p. 1223.) "These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.] However, '[w]hen the record discloses evidence in all three categories, the verdict generally will be sustained.' [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

That is the case here. Defendant had motive to kill Hernandez because he wanted to get back together with Ho and was unhappy she was dating Hernandez. He sent Hernandez angry text messages challenging him to fight and confronted Hernandez at Ho's house several times. On the day of the shooting, he brought a loaded gun to Ho's house and told her he was going to wait for and kill Hernandez, supporting an inference of planning. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471; *People v. Marks* (2003) 31 Cal.4th 197, 230; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082.)

Finally, the manner of the attempted killing suggests it was the product of reflection. When Hernandez chased defendant back to his truck, defendant pulled out his gun and cocked it, but did not immediately fire it at Hernandez as defendant notes. Rather, defendant allowed Hernandez run to his car and drive away. But instead of letting him go, defendant then decided to chase after him for 5-10 minutes, following closely behind and reaching speeds of 50-60 miles per hour in a residential zone.

Defendant pointed the gun at Hernandez when he slowed down and waited to fire the gun until he had slowed down again, the bullet barely missing Hernandez's head. He then followed Hernandez to Ho's house, parked his car, and fired another shot.

Defendant maintains he "was not the original aggressor[, was] react[ing] to being chased by Hernandez," and "was angry, upset, and under the influence of methamphetamine." Because he was "acting in the heat of the moment and under the influence of a powerful drug," he argues, there was no substantial evidence he "engaged in any thought or reflection." But although the evidence may support those inferences, it does not exclude the conclusion he acted with premeditation and deliberation. """"""If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) Because there was substantial evidence supporting the jury's finding defendant's actions were willful, premeditated, and deliberate, we affirm the judgment.

*2. CALCRIM No. 302*

Defendant argues the court violated its sua sponte duty to instruct the jury with CALCRIM No. 302 on how to weigh conflicting witness testimony. The Attorney General agrees, as do we, the instruction should have been given in light of the conflicting testimony. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 751.) But failure to give the instruction is prejudicial only where there is a "'reasonable likelihood'" the error caused juror misunderstanding. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1097, disapproved on another ground in *People v. Letner* (July 29, 2010, S015384) ___ Cal.4th. ___ [2010 WL 2976678, * 50].) To make that determination, we consider the entire record and the totality of the instructions that were actually given. (*Ibid*.)

The court's failure to give the instruction was not prejudicial. The jury was instructed on witness credibility and directed not to "automatically reject testimony just because of inconsistencies or conflicts." (CALCRIM No. 226.) The same instruction informed the jurors they "alone, must judge the credibility or believability of witnesses" and the weight to be given to each witness's testimony. (*Ibid.*) It also told them they could use the prior inconsistent statements of witnesses in evaluating whether their testimony was believable. (*Ibid.*) The jury received instruction on how to evaluate direct and circumstantial evidence (CALCRIM Nos. 222, 223), to give defendant the benefit of reasonable doubt, and to "impartially compare and consider all the evidence that was received throughout the entire trial" (CALCRIM No. 220). The sufficiency of a single witness's testimony to prove any fact was explained (CALCRIM No. 301), as was how to weigh expert and lay opinions (CALCRIM Nos. 332, 333). Moreover, in addition to the presence of these instructions, the prosecutor did not argue in her closing argument that more witnesses supported conviction than the number that opposed it.

Defendant claims none of the instructions given "told the jury that it was required to reject some evidence in order to accept other evidence" or "'if there's a conflict in the evidence, you must decide what evidence, if any to believe.'" On the contrary, both of these statements were covered by CALCRIM No. 226. Based on the entire record we conclude no prejudicial error occurred.

*3. Correction of Abstract*

The Attorney General correctly concedes two errors in the abstract of judgment. First, the box marked "concurrent" is not checked off although defendant was sentenced to a concurrent term of 15 years to life on count 3. Second, the court stayed the sentences on counts 4 and 5 but the abstract states defendant was sentenced concurrently. We also agree with the Attorney General's concession that defendant's custody credits should be 690 rather than 689 days.

## DISPOSITION

The trial court is directed to prepare an amended abstract of judgment for defendant's indeterminate prison sentence (1) specifying the term on count 3 is to be served concurrently, (2) staying the sentences on counts 4 and 5, and (3) crediting defendant with 690 days of presentence custody credit, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.